



Submission to

**Consumer Affairs Australia and New Zealand (CAANZ)**

Subject

**Australian Consumer Law Review**

**Issues Paper**

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## 1. Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcome the opportunity to respond to the Australian Consumer Law Review (the **ACL Review**) being undertaken by Consumer Affairs Australia and New Zealand (**CAANZ**).

IGEA has reviewed the ACL Review Issues Paper (the **Issues Paper**) and the accompanying fact sheets. In our submission, we provide an overview of IGEA and the interactive games industry in Australia, followed by responses to specific questions and issues raised in the Issues Paper.

## 2. Executive Summary

By way of executive summary, IGEA is of the view that:

### 1. Digital content

- a. The characteristics of digital content and physical goods differ in many important respects, such that the separate treatment of digital content and physical goods under the Australian Consumer Law (**ACL**) is justified.
- b. Difficulties arise from the ACL's treatment of digital content. For example:
  - i. The definitions of "goods" and "services" are difficult to apply to digital content, which causes confusion for businesses and consumers. This is especially so in the case of video games, as the games industry is highly innovative and is regularly creating new business models that blur the distinction in the ACL between "goods" and "services".
  - ii. The ACL provides the same set of consumer guarantees and remedies to both digital content and physical goods, which in many cases is inappropriate and impractical for the digital content industries. The issues that arise are especially problematic for video games, as they are some of the most complex forms of digital content available.
- c. The ACL should incorporate a separate scheme for digital content, providing distinct definitions, consumer guarantees and remedies that are appropriate, tailored and practical for digital content. In doing so, the *United Kingdom Consumer Rights Act 2015* should be examined closely as a useful example in this regard.

- d. The ACL should also be amended in a number of other respects, which include increasing the threshold level as to what does not constitute “acceptable quality” for complex forms of digital content such as video games, and also raising the “reasonable time” required for repairing or replacing these kinds of digital products before additional remedies are available.

**2. Online purchases and total minimum price**

- a. Sellers should only be required to advertise the minimum price of a good and/or service, and to only disclose compulsory (not optional) fees or charges upfront.

**3. Consumers accessing consumption and transactional data**

- a. It is appropriate to reserve comments on this issue until the Productivity Commission has completed its investigation into the availability and use of public and private sector data.

**4. Clarity of the ACL and consumer guarantees**

- a. The ACL can be improved in a number of ways, such as by:
  - i. Providing a more appropriate and tailored definition of “major failure” for digital content;
  - ii. Offering further guidance as to what constitutes a “major failure” and in what circumstances consumers are able to seek a refund over a repair or replacement in the first instance; and
  - iii. Clarifying the concept of a “reasonable” time or period in the ACL, such as with regards to the rejection period for goods and the guarantee as to repair and spare parts.

**5. Administering and enforcing the ACL**

- a. Regulators need to be more collaborative with businesses.
- b. The involvement of Regulators in the enforcement of the ACL should be underpinned by an appropriate evidence and risk-based approach.

**6. Australia’s consumer policy framework**

- a. The national consumer policy framework’s overarching and operational objectives could be updated to reflect international standard and approaches to consumer law and consumer protection.

### 3. About IGEA

IGEA is the industry association representing the business and public policy interests of Australian and New Zealand companies in the interactive games industry. IGEA's members publish, market, develop and/or distribute interactive games and entertainment content and related hardware. The following list represents IGEA's current members:

- 18point2
- Activision Blizzard
- All Interactive Distribution
- Big Ant Studios
- Disney Interactive Studios
- Electronic Arts
- Five Star Games
- Fiveight
- Gamewizz Digital Entertainment
- Mindscape Asia Pacific
- Namco Bandai Entertainment
- Google
- Microsoft
- Nintendo
- Sony Computer Entertainment
- Take 2 Interactive
- Total Interactive
- Ubisoft
- VR Distribution
- Well Placed Cactus
- ZeniMax Australia

### 4. Overview of the Interactive Games Industry

By way of overview, and in order to demonstrate the levels of engagement with interactive games by the Australian population, we would first like to highlight the results of IGEA's Digital Australia 2016 Report (**DA16 Report**) released on 28 July 2015.<sup>1</sup> In particular, the Report found that:

- 98 percent of Australian homes with children under the age of 18 have a device for playing interactive games
- 68 percent of Australians play interactive games, with 78 percent of the game playing population aged 18 years or older
- Older Australians continue to make up the largest group of new players over the past four years. Australians aged 50 and over now make up 23 percent of the interactive game playing population - increasing their essential digital literacy for the digital economy
- The average age of those engaged in Australian interactive games has increased from 32 to 33 years old since 2013 and nearly half (47 percent) of this population is female

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<sup>1</sup> IGEA, *Digital Australia Report 2016* (28 July 2015) <<http://www.igea.net/wp-content/uploads/2015/07/Digital-Australia-2016-DA16-Final.pdf>> [accessed 15 January 2016].

- As part of the normal media usage, the daily average time spent playing interactive games by Australians is 88 minutes
- 27 percent of players have tried making interactive games using software and 9 percent have studied or plan to study interactive games subjects

The DA16 Report also states that digital software sales in Australia’s game market reached AU\$1.589 billion in 2015 (up by 27% compared to 2014), with physical software sales generating only \$579 million in 2015. Accordingly, digital software sales of games made up 73% of total software sales in Australia in 2015. Consumers are increasingly turning to digital goods as their preferred medium of purchase, particularly due to the relative ease of purchasing, accessing and enjoying such content.

For further Australian video game market data in 2015, including additional data from IGEA’s DA16 Report please refer to **Appendix A** of this submission.

## 5. Digital Content

*“...whether the remedies are appropriate, or should be tailored, for digital content (such as music and app downloads)”<sup>2</sup>*

### Nature of digital content in the interactive games industry

The proliferation of the sale and distribution of digital content over recent times has been noteworthy. Particularly with regards to the video games industry, consumers are now able to access a huge range of games and game content over the internet. All game platforms (including computers, consoles, handheld devices and smart phones) allow users to purchase, download, install and play games and associated content. Moreover, a growing category of platforms (including smart phones, tablets, smart TVs and even newer laptops) do not have hardware components such as CD, DVD and Blu-ray drives. As a result, many current and popular platforms are unable to read, install and process video games on physical media, and thus can only receive and play digitally distributed video games. While these games may include downloadable versions of games that are also released as physical or “boxed”

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<sup>2</sup> Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Issues Paper* (March 2016), page 22 <[http://consumerlaw.gov.au/files/2016/03/ACLreview\\_issues\\_paper.pdf](http://consumerlaw.gov.au/files/2016/03/ACLreview_issues_paper.pdf)>.

games, there is an increasingly growing range of games that are exclusively digitally distributed.<sup>3</sup> For example, since 19 March 2015, there have been more than 460,000 different games created and published for digital distribution in Australia, compared to approximately 500 games that have been published for physical distribution.<sup>4</sup>

There is also a wide array of new and exciting business models in the video games industry that have been enabled by, and have thrived within, this digital distribution environment.<sup>5</sup> These include:

- **Point of sale digital downloads** – digital downloads that can be purchased at traditional, “bricks and mortar” retailers through point of sale activation (**POSA**) cards.
- **Subscription services** – where users pay a periodic fee to gain access a certain game or a regularly changing selection of games. This is a concept known as “games as a service” and it is very much now a fundamental part of the video games industry.
- **Episodic games** – where games are broken down and sold in separate parts, each of which can be purchased and played individually or as an entire package. For example, rather than selling one game for \$100, an episodic game could be distributed in five separate parts costing \$20 each.
- **Free-to-play or “freemium” games** – where games are provided to the consumer for free (or at a nominal fee), with revenue being derived from alternative sources such as in-game advertising and/or in-game purchases (i.e. that provide in-game items, unlock further levels, offer additional features, etc.)
- **Early access games** – where games are distributed prior to the traditional retail launch of the game in an “as-is” state (i.e. the game is still in development but is provided early in an incomplete state, without the full feature set, and likely with many bugs and glitches). This business model allows consumers to experience a video game earlier than the rest of the public and potentially enables them to shape the development of the final retail product.

The digital video games market in Australia continues to grow strongly and has now in fact surpassed the traditional physical retail goods market in terms of revenue generated. To reiterate the above, with regards to game software, digital software sales in Australia’s game market reached AU\$1.589

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<sup>3</sup> IGEA, *Emerging Issues and Solutions for the Classification of Computer Games in Australia* (2 December 2013) <<http://igea.wpengine.com/wp-content/uploads/2013/12/IGEA-Classification-Issues-and-Solutions-Paper.pdf>> [accessed 24 May 2016].

<sup>4</sup> These estimated figures are based on the number of games classified by the Classification Board since 19 March 2015, obtained from the Classification database and the Classification Board’s annual reports. See <<http://www.classification.gov.au/pages/search.aspx>> and <<http://www.classification.gov.au/About/AnnualReports/Pages/Annual-reports.aspx>>.

<sup>5</sup> IGEA, above n 3, pages 7-9.

billion in 2015 (up by 27% compared to 2014), with physical software sales generating only \$579 million in 2015. Accordingly, digital software sales of games made up 73% of total software sales in Australia in 2015.<sup>6</sup> As can be seen, consumers are increasingly turning to digital goods as their preferred medium of purchase, particularly due to the relative ease of purchasing, accessing and enjoying such content.

Digital content differs from physical goods in a number of important ways. At a simple level, physical goods are tangible products that can only be distributed physically, whereas digital content is produced, stored and used in a digital and intangible format, and is supplied electronically over the internet. As a result of differences such as these difficulties can and do arise when attempting to apply the Australian Consumer Law (ACL)<sup>7</sup> to digital content, particularly because the definitions and provisions of the ACL treat digital content and physical goods in an equal manner. These issues can be especially problematic in the case of video games as they are some of the most complex forms of digital content. Games are incredibly intricate products, containing thousands and sometimes millions of lines of code. Therefore, it is important that Australia's consumer legislation deals with digital products in a more tailored and appropriate manner.

## Issues with digital content and the ACL

The existing structure and framework of the ACL does not recognise the vastly different nature of digital content and its great importance to Australia's economy, and therefore does not cater for the many needs of both businesses and consumers in the digital marketplace. The Issues Paper correctly points out a number of practical issues regarding the treatment of digital content under the ACL, particularly where the existing definitions of "goods" and "services" are difficult to apply to digital content. There exists a grey area when attempting to distinguish digital goods and services under the ACL, which therefore results in uncertainty about the consumer rights/guarantees and remedies that apply. We essentially have an analogue piece of legislation trying to have currency in a digital marketplace.<sup>8</sup>

By way of example, in the recent case of *ACCC v Valve*,<sup>9</sup> the Federal Court had to consider whether a supplier of digitally delivered computer games provided a "good" or a "service" as defined in the ACL.

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<sup>6</sup> IGEA, above n 1.

<sup>7</sup> *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

<sup>8</sup> Commonwealth of Australia, *Official Committee Hansard*, Senate, Legal and Constitutional Affairs References Committee, Thursday, 7 April 2011, page 32.

<sup>9</sup> *Australian Competition and Consumer Commission v Valve Corporation* (No 3) [2016] FCA 196 ('*ACCC v Valve*').



While the Court ultimately concluded that, in the specific circumstances of the case, the supplier had indeed provided “goods” to Australian consumers, it is clear from the judgment that this decision required extensive technical legal analysis of the facts. In essence, the existing definitions of “goods” and “services” in the ACL simply did not fit easily with the digital content distributed in the case, a problem which was further exacerbated due to fact that the digital content in question was distributed as part of an overall digital service.

As new forms of digital content are created and as distribution models further mature, similar and more complex difficulties and disputes are likely to arise again in the future. This will especially be so within the video games industry, given its high rate of experimentation and innovation with emerging business models. In fact, issues are already arising for the video game business models outlined above, such as game subscription services, episodic games and free-to-play games. These forms of digital content are very complex offerings that are often underpinned by many services, including monthly subscriptions for online gameplay and “cloud-gaming” services for renting access to a game online. These types of content often fall between the ACL’s binary definition of either “good” or “service”.

For example, an individual episodic video game could be considered a “good” as it is a piece of computer software. However, this single episodic title would only be one component of the consumer’s experience – the supplier or publisher in question is actually supplying a series of video game “episodes” over time in an iterative manner via a digital distribution service, similar to how TV show is provided episodically as part of a digital service such as Netflix or Foxtel Go. As a result, digital suppliers and distributors of episodic games would understandably have many difficulties in attempting to discern whether a “good” or a “service” is being delivered.

This confusion also exists in the case of game subscription services that, as described above, involve the payment of periodic subscription fees to gain access to either one game or multiple games. Such services typically involve the provision of many other online features including customer support, community forums and groups, friend lists, in-game chat, music players, user profiles and groups, user-generated content facilities, review pages and many other “non-game” and social offerings. However, as a result of the ACL’s treatment of “goods” and “services”, in such circumstances there is likely to be an extreme amount of confusion and uncertainty as to whether it is a “good” or “service” being supplied. Very similar difficulties arose in the above-mentioned *ACC v Valve* case, where the supplier operated a platform from which games were sold but that also offered many of the aforementioned “non-game” services. While the Court ultimately reached the conclusion that “goods” were supplied, this decision was based on the very specific facts of the case. In other circumstances where different

forms of digital video game content are at issue, particularly game subscription services, it is very much the case that such content could still be considered a “service” rather than a “good”.

Importantly, because the ACL imposes a different set of consumer guarantees depending on whether a supplier is delivering a “good” or “service”, it is crucial for suppliers to be able to easily understand what they are actually supplying to consumers. For suppliers of goods, there exists guarantees as to title, undisturbed possession, acceptable quality, fitness for disclosed purpose, repairs and spare parts, express warranties, and also guarantees relating to the supply of goods by description and by sample or demonstration model.<sup>10</sup> For suppliers of services, there exists a smaller number of guarantees, including those as to due care and skill, fitness for a particular purpose, and reasonable time for supply.<sup>11</sup> As a result, suppliers and distributors of digital content in particular are likely to be unclear about their obligations under the ACL, especially where the product supplied could be defined as both a good and/or a service.

Moreover, the provisions relating to remedies for goods and services under the ACL can be problematic for digital content as they are not sufficiently tailored. For example, the right to reject a good<sup>12</sup> could easily be abused in the case of digital content, because once a digital good is downloaded, consumers could easily copy the software onto a separate hard drive and then attempt to reject the product and obtain a refund. Furthermore, whilst the definition for “major failure”<sup>13</sup> may be appropriate for physical or tangible goods, it does not take into account the fact that frequent updates and patches often follow the release of digital content, which in most cases would address many failures that could be considered “major” under the ACL. Yet, even in such circumstances, consumers are simply able to reject the product outright without even providing the supplier an opportunity to rectify the fault. Note that issues such as these are discussed in much further detail in the below section concerning the *United Kingdom Consumer Rights Act 2015 (CRA)*.<sup>14</sup>

Accordingly, IGEA recommends that the ACL’s consumer guarantees and remedies are appropriately tailored for digital content by introducing “digital content” as a separate category of supply with a distinct set of consumer guarantees and remedies.

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<sup>10</sup> *Australian Consumer Law* sub-div A.

<sup>11</sup> *Ibid* sub-div B.

<sup>12</sup> *Ibid* s 259(2)-(3).

<sup>13</sup> *Ibid* ss 260, 268.

<sup>14</sup> *Consumer Rights Act 2015* (UK).

## Recommendations

IGEA recommends that the ACL should be amended to implement a separate and distinct scheme purely for “digital content”. In doing so, it should not be the case that suppliers, distributors and manufacturers of digital content are imposed with obligations greater than those which currently exist for physical or tangible goods. Rather, the scheme should be designed in a manner that is appropriate for digital content and appreciative of the nature and characteristics of these kinds of products.

Specifically, we believe it would be beneficial for the ACL to incorporate a separate definition of “digital content” and a new chapter or division that establishes a separate list of consumer guarantees and associated remedies that are specific and proportionate to digital content. The differences in the nature and characteristics of digital content and physical or tangible goods are large enough to justify this dual-approach, particularly because of the aforementioned challenges that can arise when applying the pre-existing ACL provisions to digital content.

Introducing a new scheme that provides carefully tailored rules for digital content would help resolve a number of the aforementioned issues that exist with the ACL, thereby providing more certainty to both consumers and businesses. Consumers would better understand the rights they hold with regards to digital products and therefore be more confident in their purchases, whereas businesses would better understand the obligations they hold with regards to the digital product they supply. In effect, having clear guidelines on what stakeholders can expect will be very helpful in situations when problems occur. This certainty may also make Australia a more attractive market for international businesses, especially because a separate scheme for digital content would be something more properly aligned with existing best practice globally.

After acknowledging the unique challenges for digital content, the United Kingdom has already implemented this kind of “two-pronged” system, wherein different rules and provisions apply to physical goods and digital content.<sup>15</sup> We believe that the ACL should adopt a similar approach. Because digital content and video games in particular are offered and sold internationally over the internet, the rules around online commerce and consumer law should not fall too far out of line with global practices.

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<sup>15</sup> See Mark Fisher, *Consumer Rights Act 2015: What has changed?* (17 September 2015) <<http://www.fieldfisher.com/publications/2015/09/consumer-rights-act-2015-what-has-changed#sthash.9eFCkub.BofVXrop.dpbs>> [accessed 24 May 2016]; Department for Business Innovation & Skills, *Consumer Rights Act: Digital Content* (September 2015) <[https://www.businesscompanion.info/sites/default/files/Digital%20content\\_ALL\\_BIS\\_DIGITAL\\_GUIDANCE\\_SEP15.pdf](https://www.businesscompanion.info/sites/default/files/Digital%20content_ALL_BIS_DIGITAL_GUIDANCE_SEP15.pdf)>.

## United Kingdom Consumer Rights Act 2015<sup>16</sup>

The *United Kingdom Consumer Rights Act 2015 (CRA)* makes a firm distinction between “goods” and “digital content”. “Goods” are defined to mean: “an tangible moveable items, but that includes water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity”. “Digital content” is defined as: “data which are produced and supplied in digital form”.<sup>17</sup> We believe that it would be beneficial for the ACL to also provide two separate definitions for digital content and physical or tangible goods, as opposed to the current approach whereby “goods” are simply defined to include “computer software”.

The CRA then goes on provide a separate set of statutory rights and remedies for “goods” and “digital content”.<sup>18</sup> The statutory rights and standards of quality for digital content are generally similar to those applicable to physical goods, in that both digital content and goods must be of satisfactory quality, fit for a particular purpose, and as described. However, there are certain distinctions that are reflective of the inherent differences between physical goods and digital content. For example, whereas physical goods must match any sample or model of the goods that were seen by the consumer and also installation of the goods (if required under the contract) must be correct,<sup>19</sup> similar provisions do not exist for digital content. In the case of matching samples or models, it is appropriate that digital video games are not imposed with such requirements, in part due to the fact that game demonstration models or “demos” are not used just to give consumers a small taste of the full game but rather to simply introduce themes and/or concepts.

With regards to remedies under the CRA, there exists a three-tier structure for goods, where the following remedies are available:<sup>20</sup>

- Short-term right to reject;
- Right to repair or replacement; and
- Right to a price reduction or final right to reject.

For digital content, a two-tier remedy structure is instead provided, wherein the following remedies are available:<sup>21</sup>

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<sup>16</sup> *Consumer Rights Act 2015* (UK).

<sup>17</sup> *Ibid* s 2(8)-(9).

<sup>18</sup> *Ibid* chs 2, 3.

<sup>19</sup> *Ibid* ss 14-15.

<sup>20</sup> *Ibid* ss 19-24.

<sup>21</sup> *Ibid* ss 42-45.

- Right to a repair or replacement and
- Right to a price reduction.

As can be seen, there are a number of differences in the remedies that are available for physical goods and digital content under the CRA Specifically:

- There is no restriction on the number of times digital content can be repaired or replaced before a consumer is able to obtain a price reduction. For goods, there exists a cap or limit of only one repair or replacement before the right to a price reduction is available.<sup>22</sup>
  - This provision reflects the reality that digital content is able to be updated or “patched” easily with a simple download, which generally fix bugs and faults universally for all consumers that have purchased the product. This is simply not the case for physical goods, where defects usually impact a small percentage of goods manufactured and are required to be fixed physically by hand.
  - Furthermore the provision also understands that imposing a strict rule in the number of repairs is not practical for the digital content industry. For example, with regards to video games, many flaws or defects can be caused due to problems in the game’s code. Discovering, understanding and fixing coding issues can be very difficult and time consuming. Because games contain thousands if not millions of lines of code, it is inevitable that a relatively high number of flaws or defects exist on the release of a game. In fact, many issues may only arise after the game has been released for many weeks or months and has already received a number of patches or updates. Even more so, attempts at fixing code can very easily cause other unforeseen issues in the code, which then may require further patches or fixes Therefore, placing strict limit
  - the number of times a developer can “repair” a digital product is just not a flexible or appropriate approach for the digital content industry.
- The right to short-term rejection and final right to reject both only exist for goods and not for digital content Therefore, for physical goods, if statutory rights are not met within 30 days of purchase and delivery, consumers are able to exercise the right to reject by treating the contract as having come to an end, returning the good or making it available for collection by the trader, and receiving a refund.<sup>23</sup> These provisions do not apply to digital content.

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<sup>22</sup> Ibid s 24(5)(a).

<sup>23</sup> Ibid ss 20-24.

- By limiting the right to reject to only physical goods and not to digital content, the UK's CRA acknowledges the inherent nature and characteristics of digital content.
- When rejecting or returning physical or tangible goods, consumers are forced to physically give the product in question back to the supplier or manufacturer. However, this is just not practical for digital content. Suppliers would have to try and determine whether the consumer has deleted all copies of the digital content from the device in question and also all other external hard drives. This is simply impossible. The open nature of digital content means that it is incredibly simple and easy to make copies of digital products any number of times. As a result, consumers could easily abuse a right to reject a piece of digital content by making a separate copy, and then attempting to reject the product and obtain a refund. This would likely create a detrimental trend of consumers being able to easily obtain free games and associated content. This clearly shows that providing a right to reject digital products fails to reflect the realities of digital content markets.
- This potential for abuse is even more pressing when considering that a lot of bugs or flaws in video games are caused by problems in the game's code. As a result, problems that exist for one consumer will be very likely present for every other consumer of the game. Therefore, any right to reject/refund would be universal. In other words, if every single consumer was able to reject a video game and obtain a refund without first giving the trader or supplier the chance to repair the digital product, refunds would have to be offered to every single customer of the game. This means that traders or suppliers would potentially have to refund the entirety of the revenue obtained from a game, thereby creating a large disincentive to sell games in the first place.
- Therefore, rather than allowing consumers to simply reject digital content and obtain refunds, the CRA first provides consumers with the right to have digital products either repaired or replaced.<sup>24</sup> If a repair or replacement is either not possible or not provided by the trader within a "reasonable time" and without significant inconvenience to the consumer, consumers may then exercise the right to a "price reduction". In this scenario, a trader or supplier must reduce the price of a digital product by an appropriate amount that reflects the impact or level of the faults. In other words, this enables consumers to obtain compensation (i.e. reductions in price)

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<sup>24</sup> Ibid ss 43-44.

to cover elements of the digital product which has failed, and also allows a reduction to the full amount of the purchase price if it is appropriate to do so. It also means that repairs or replacements must be pursued by consumers in the first instance when attempting to rectify failures.

In summary, we believe that it is imperative, in a maturing digital economy, that the ACL should adopt a similar approach to the CRA and treat digital content and physical or tangible goods differently, particularly with regards to the definitions, consumer guarantees and remedies. There are, however, a number of further recommendations we would like to suggest.

## Further Recommendations

First, with regards to the guarantee of acceptable quality, the bar or threshold level as to what does not constitute “acceptable quality” for video games should be set quite high. As alluded to above, video games are incredibly complex pieces of digital content that require thousands if not millions of lines of code to run, with many in-game assets including pictures, graphics, music, audio files, levels, character models, user interfaces, online features and various other aspects being required to all work effectively together. Therefore, expectations as to quality and remedies are very different for video games in comparison to other forms of digital content (let alone physical or tangible goods).

As a result, consumers in the games industry generally accept that bugs are an unavoidable aspect of video games, especially after the release or “launch” of a game, and that developers will usually fix any issues in due course. In these circumstances, it may be the case that reasonable consumers still consider such games to be of “acceptable quality”. It would only really be at the stage where a game contains major “game-breaking” bugs or a very large number of minor bugs that reasonable consumers would consider the title to be fundamentally unplayable and therefore not of “acceptable quality”, at which stage a remedy may wish to be sought.

Second, if the ACL were to adopt the aforementioned CRA two-tier remedy structure for digital products, the “reasonable time” required for a supplier to repair or replace digital content before the right to a price reduction exists should be appropriately tailored for digital content and video games in particular. Generally, it should be the case that the calculation of a “reasonable time” to remedy any failure(s) to comply with the consumer guarantees takes into account the inherent nature of video games and, as a result, be longer than what a “reasonable time” may be for other forms of digital content and especially physical or tangible goods.

Many faults or defects in video games will be caused by issues or problems in the underlying code of the game. This means that if a particular consumer experiences bugs in a game, then it is highly likely that every other consumer that has purchased the game is also facing the same or similar problems. Therefore, developers are required to release patches or updates universally to all consumers in order to fix any such issues, as opposed to offering individual support. Moreover, many faults in games can emerge due to factors that are largely not the fault of the developer, including conflicts with third party software, incompatible hardware, and operating system updates. As a result of issues such as these, and in combination with the highly complex nature of games and underlying code, developers will require sufficient time to identify, understand, resolve and fix coding issues. This reality needs to be taken into account in the ACL when determining what a “reasonable time” is for remedying a failure to comply with the consumer guarantees with regards to video games.

## 6. Online Purchases and Total Minimum Price

***“Is it sufficient for a business to disclose the total minimum price before making a payment, or should optional fees and charges also be disclosed upfront?”<sup>25</sup>***

IGEA does not believe that optional fees and charges should have to be disclosed upfront. While price transparency is important to ensure that consumers can avoid having to pay more than an advertised price that is not truly representative of the minimum total price payable, a balance needs to be struck with practical business considerations.

For example, a single video game title may eventually come with hundreds of different pieces of purchasable additional content, such as in-game items or other downloadable content, which are entirely optional and not compulsory to play the game. In many cases, when the video game is initially sold or downloaded, developers and publishers may not have yet determined the details, volume or prices of the additional content that will eventually be purchasable for the game in the future. Therefore, requiring sellers or suppliers of games to disclose the price of every optional purchasable item or additional piece of content would impose incredibly onerous and likely practically impossible, disclosure requirements. Moreover, it also has the potential to be misleading to consumers who may never purchase all of the options.

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<sup>25</sup> Consumer Affairs Australia and New Zealand, above n 2, page 53.



Accordingly, we agree with the Issues Paper’s intention to only require sellers to advertise the minimum price of a good or service and to only disclose compulsory fees or charges upfront (not those that are optional).

## 7. Consumers’ Access to Data and the ACL

***“Do consumers want greater access to their consumption and transactional data held by businesses? What is the role of the ACL and the regulators in supporting consumers’ access to data? Is there anything in the ACL that would constrain efforts to facilitate access?”<sup>26</sup>***

At this early stage, it is very difficult to determine the role(s) that the ACL should have with regards to consumers accessing their consumption and transactional data, if any, especially given the applicability of the *Privacy Act 1988* (Cth) and the role and powers of the Office of the Australian Information Commissioner. The Australian Privacy Principles also play a role in this area, whereby APP entities must provide consumers with access to their personal information when requested. IGEA believes that it is appropriate to reserve our stance on this topic until the Productivity Commission has completed its investigation into the availability and use of public and private sector data, which is due by March 2017.

## 8. Clarity of the ACL and Consumer Guarantees

***“Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?”<sup>27</sup>***

While the language of the ACL is generally clear and simple to understand, there are a number of aspects that could be improved. In particular, it would be beneficial for businesses, consumers and stakeholders to be provided with more clarity on the ACL consumer guarantees and remedies, including how they operate in practice.

Firstly, as stressed in section 5 above, the ACL’s equal treatment of digital content and physical or tangible goods can be very unclear at times and cause confusion for businesses and consumers. To reiterate relevant examples, the ACL’s definition of “major failure”<sup>28</sup> does not square nicely with the

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<sup>26</sup> Ibid page 59.

<sup>27</sup> Ibid page 8.

<sup>28</sup> *Australian Consumer Law* ss 260, 268.

reality that digital content is able to be updated, patched and/or resupplied quite easily in order to rectify failures potentially considered as major under the ACL. Additionally, the ACL's distinction between "goods" and "services"<sup>29</sup> can be quite difficult to apply towards digital content. While, as highlighted in the Issues Paper, regulators can (and do) issue guidance for businesses and consumers, ranging from information about the law to enforcement policies and regulatory guides on specific issues, these tend to be geared towards the supply of physical or tangible goods and services delivered "offline" rather than digital content and the software and/or technology industries more generally.

Secondly, from the experience of some of our members, when a supplier or business fails to comply with the consumer guarantees, consumers tend to believe that they are always entitled to a refund, regardless of whether the failure was "major" or "minor". This may be caused by a number of factors, including the wording of the ACL provisions and also information that is published by the ACCC towards consumers about these kinds of situations. As a result, some retailers and suppliers may feel obligated to provide refunds when rectifying failures in all cases, when they actually have the right to choose between repairing, replacing or refunding money paid for the good if the failure is "minor".<sup>30</sup> Consequentially, this may prevent manufacturers from being able to rectify failure(s) by undertaking repairs. Unfortunately, while only "major" failures allow consumers to reject goods and seek a refund,<sup>31</sup> this has not been communicated particularly well to consumers, suppliers and stakeholders more generally.

There also seems to be uncertainty as to what actually constitutes a "major failure" under the ACL, particularly because of the provision that states a major failure has occurred where "the goods [supplied] would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure".<sup>32</sup> The ACL provides little clarification or guidelines to help determine how this provision operates practically. Simply on its face, it could easily be suggested that a reasonable consumer would never acquire a good if it contained a flaw or defect of any kind, whether in practice the flaw or defect was in fact minor or not, and therefore any product defect could be considered to be a "major failure". As a result, again, suppliers often feel obligated to always provide a refund for a product, even though repair or replacement could easily be a reasonable response. Importantly, this might even occur after a consumer has already used and enjoyed the product substantially. Accordingly, we suggest that the ACL be amended to ensure that a failure to comply with a guarantee

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<sup>29</sup> Ibid s 2.

<sup>30</sup> Ibid ss 259(2), 267(2).

<sup>31</sup> Ibid s 259(3), 267(3).

<sup>32</sup> Ibid ss 260(a), 268(a).

is not a major failure where the failure in question could reasonably be remedied by repair or replacement. Additionally, as addressed above, it should be the case that repair or replacement is the first right that consumers can utilise before any other remedies are enforceable.

Thirdly, there is a lack of clarity about areas of the ACL that refer to the concept of a “reasonable” time or period. For example, the rejection period for goods is defined as “the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee”.<sup>33</sup> However, while the ACL lists some factors that can be taken into account in calculating the length of the rejection period, there are no guidelines or examples to further assist businesses and suppliers. Additionally, while the guarantee as to repairs and spare parts<sup>34</sup> stipulates that a manufacturer will ensure that facilities for the repair of the goods (and parts for the goods) are available for a reasonable period after the goods are supplied, the ACL doesn’t provide any assistance or guidance as to how long the “reasonable period” is supposed to be, nor of any criteria that may be used to calculate the length of such a period.

In order to ensure that there is greater certainty and clarity for businesses and consumers, it would be beneficial for the ACL to clarify the time and duration elements of the ACL. Specifically, in consultation with relevant industry groups, guidelines and criteria should be developed for the ACL (including the consumer guarantees) that, for instance, help identify what a “reasonable period” might be in practice (particularly for digital content).

Accordingly, IGEA believes that the clarity of the ACL can be improved in the ways suggested above.

## 9. Administering and Enforcing the ACL

### ***“Does the ACL promote a proportionate, risk-based approach to enforcement?”<sup>35</sup>***

IGEA understands that, as part of examining the ACL’s approach towards administration and enforcement, a further independent assessment of the “multiple regulator” model will be undertaken, which will also seek stakeholder feedback on the issue. IGEA looks forward to giving feedback at the time this assessment is commissioned. In the meantime, we would like to provide some general comments about the role of regulators in administering and enforcing the ACL.

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<sup>33</sup> Ibid 262(2).

<sup>34</sup> Ibid s 58.

<sup>35</sup> Consumer Affairs Australia and New Zealand, above n 2, page 36.

In order to ensure that Regulators are continuously kept informed of changing technologies, business practices and models, Regulators need to be more collaborative with businesses. Furthermore, the involvement of Regulators in the enforcement phase should be underpinned by an appropriate evidence and risk-based approach. When investigating and responding to an alleged breach of the ACL by a business, Regulators should consider the actual damage caused to consumers, subsequent changes in business practices and policies after a breach has occurred and the likelihood of consumer harm moving forward into the future.

There are a number of overseas initiatives that could help achieve the above goals. For example, IGEA is open to the option of adopting an ombudsmen scheme similar to that of the United Kingdom that is outlined in the Issues Paper at case study 14. Examples such as these should be looked at closely when the aforementioned independent assessment of the “multiple regulator” model is undertaken.

## 10. Australia’s Consumer Policy Framework

*Do the national consumer policy framework’s overarching and operational objectives remain relevant? What changes could be made?<sup>36</sup>*

IGEA believes that the consumer policy framework’s overarching and operational objectives are relevant, however they could be updated to reflect international standards and approaches to the issue of consumer law and consumer protection. Importantly, levels of consumer protection for international transactions should be realistic and not discourage international businesses from engaging with Australian consumers. A national approach for consumers and businesses with a single, national consumer law is certainly important. However, we now live in a digital economy where businesses are able to sell goods and services internationally with relative ease. Any “national” law should therefore complement and align with consumer protection laws and associated objectives in international regimes.

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<sup>36</sup> Ibid page 5.

## **11. Conclusion**

IGEA would again like to thank CAANZ for the opportunity to respond to the ACL Review. We hope that this submission has been clear and detailed enough to highlight the importance of all of the abovementioned recommendations. We look forward to any and all opportunities in the future to provide further comments and feedback on how the ACL is working in practice and how it can be improved, in order to ensure that the legislative regime is appropriately tailored and fit-for-purpose for the digital marketplace and all digital content industries.

## APPENDIX A – AUSTRALIAN MARKET DATA

The IGEA's commissioned research from NPD Group Australia showed that, in 2015:<sup>37</sup>

- Video games industry growth has been led by the console sector, with current generation (Microsoft Xbox One, Nintendo Wii U and Sony PlayStation 4) consoles increasing in sales volume compared to 2014 by 9 per cent
- Console software was the best performing category, experiencing 13 per cent growth in revenue over last year
- Strong platform sales had a flow on effect to other areas, as the console accessories market grew in value by 12.2 per cent over 2014 data
- Over half (59 per cent) of game units sold were classified as G, PG or M

Further industry key highlights by independent research firm Telsyte evidenced:<sup>38</sup>

- Digital is now greater than half of the total games market, accounting for 56 per cent of sales
- Digital extras, which include season passes, map packs and game expansions, boomed with 53 per cent growth in 2015
- Games publishers are increasingly adopting the in-game purchase business model which is greatly contributing to the growth of digital extras market
- Physical products in the games market remain important with consumers indicating a preference for physical copies when purchasing as a gift or as a collectable or where there might be technical limitations such as download speeds or data caps

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<sup>37</sup> Research based on The NPD Group Australia, Time period 2014 and 2015 calendar year, and Telsyte, cited at IGEA, "Australian video game industry strides towards \$3 billion", *Media Release*, 2 March 2016, at <http://www.igea.net/2016/03/australian-video-game-industry-strides-towards-3-billion/> (accessed 2 March 2016).

<sup>38</sup> Ibid.



AUSTRALIA  
**TOTAL  
INDUSTRY  
VALUE**  
  
UP 15%  
**\$2.832  
BILLION**

**TRADITIONAL  
RETAIL**  
NPD DATA\*\*  
  
UP 2%  
**\$1.243  
BILLION**

**DIGITAL  
SALES**  
TELSYTE DIGITAL  
MARKET MONITOR\*\*  
  
UP 27%  
**\$1.589  
BILLION**

**CONSOLE SOFTWARE** UP 13%  
**\$579 MILLION**

**CURRENT GEN HARDWARE** UP 9%  
**9% UNITS**

**CONSOLE ACCESSORIES** UP 12%  
**\$166 MILLION**

**MOBILE** UP 24%  
**\$870 MILLION**

**DIGITAL DOWNLOADS** UP 33%  
**\$603 MILLION**

**SUBSCRIPTIONS** UP 29%  
**\$116 MILLION**

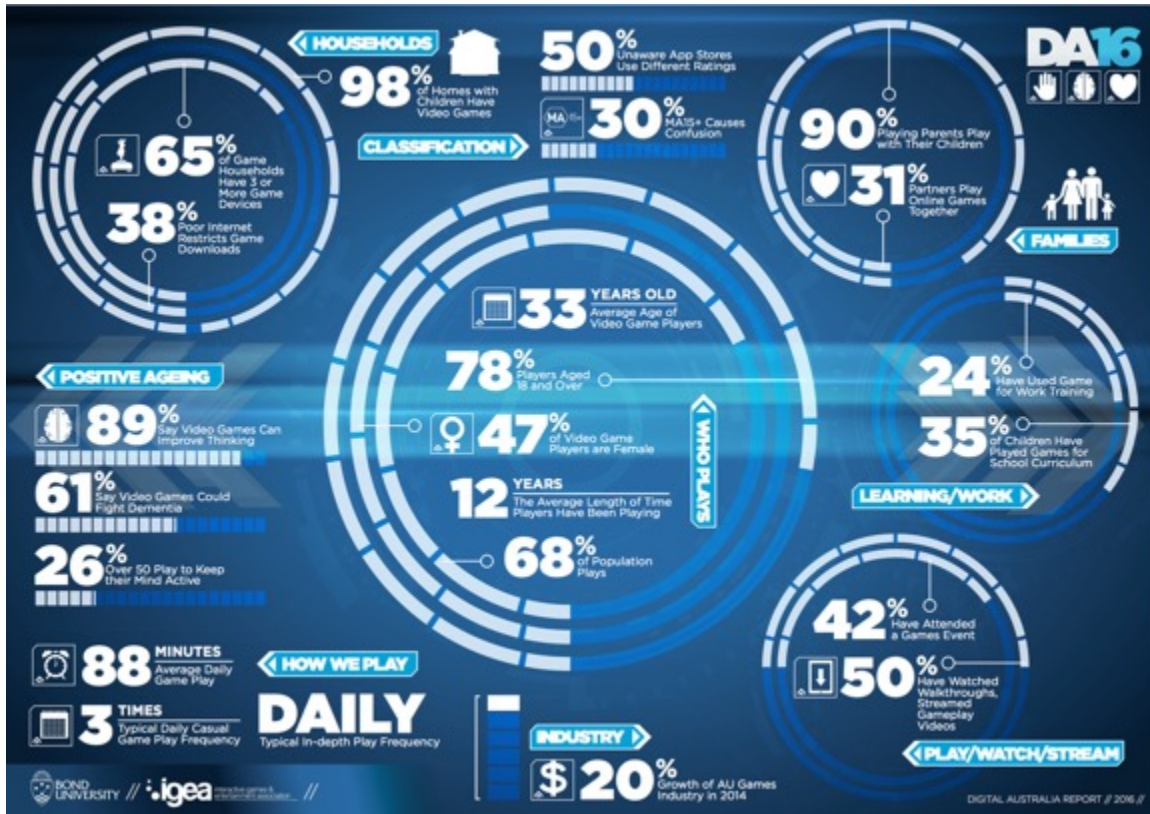


Igea commissioned research from:  
\*\*The NPD Group Australia.  
Time period January 5 2015 – January 6 2016

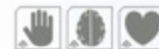
\*\*Telsyte – Igea Digital Market Monitor, Q1 – Q4 2015



## Key Findings: Digital Australia 2016



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### // Key Findings //

#### Games Households

98% of homes with children have computer games.  
65% of game households have three or more game devices.  
38% choose not to download games due to data limits.

#### Who Plays

68% of Australians play video games.  
47% of video game players are female.  
33 years old is the average age of video game players.  
78% of players are aged 18 years or older.  
39% of those aged 65 and over play video games.  
12 years is the average length of time adult players have been playing.

#### How We Play

88 Minutes is the average daily total of all game play.  
10 Minutes, three times a day is typical for casual game play.  
1 Hour, daily is typical for in-depth game play.

#### Why We Play

To keep the mind active is the main reason older adults play.  
To have fun is the primary reason PC and console players play.  
To pass time is the main reason mobile players play.

#### Families and Play

90% of playing parents play with their children.  
31% play online games with partners.  
57% of adults are "Always present" for purchase of games for children.  
66% are familiar with parental controls on game systems.

#### Classification and Media Concerns

30% indicate MA 15+ causes most confusion.  
28% indicate M causes most confusion.  
50% are unaware that app stores have different rating systems.  
41% say ratings have "a lot of influence" on games purchased for children.

#### Game Play Culture

50% have watched walkthroughs or streamed gameplay videos.  
42% have attended a games event.

#### Games and Benefits

89% say video games can improve thinking skills - health.  
79% say video games can improve coordination and dexterity - health.  
76% say video games increase mental stimulation - positive ageing.  
61% say video games could fight dementia - positive ageing.

#### Learning and Work

24% have used video games at work for training.  
35% say their children have used video games for school curriculum.

#### Game Business

20% is the amount of growth in the Australian game industry in 2014.

#### Methodology

Digital Australia 2016 (DA16) is a study of 1274 Australian households and 3398 individuals of all ages in those households. Participants were drawn randomly from the Nielsen Your Voice Panel in May 2015; research was designed and conducted at Bond University. The margin of error is  $\pm 2.7\%$ .